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No. 90-1595

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

MAKAH INDIAN TRIBE,

Petitioner,

v.

THE UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF MAKAH INDIAN TRIBE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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1. The Makah Tribe seeks to intervene in this case to participate in the in-river management process for Columbia River salmon runs. It does not seek to expand the case to address ocean management issues. Just as Idaho intervened to protect its interests in the management of migrating salmon while they are passing through the waters of Oregon and Washington, Makah seeks to protect its interests within the existing geographic scope of the case. The Tribe asks for nothing more than a level playing field, i.e., that it be permitted to participate along with other competing sovereigns in the management and allocation of a finite resource.

The district court held Makah intervention would have been timely in 1986, while the parties were negotiating a long-term management plan, but was untimely in early 1988, when the plan was made public

for the first time and submitted to the district court for approval as a consent decree. Pet. App. C19 (intervention would have been timely in 1986); A-11 (characterizing plan as a consent decree). The timeliness issue was the only issue addressed by the Ninth Circuit. Pet App. A57.

Respondents oppose certiorari on the ground that the district court held Makah did not satisfy other Rule 24(a)(2) requirements.[1] This is an attempt to divert attention from the timeliness issue. The district court's other holdings are subject to de novo review on appeal. Pet. App. A47. That has not yet occurred. Speculation

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[1] No one defends the district court's holding that Makah is adequately represented by the existing parties. The Columbia River tribes recognize (and base much of their argument on the fact) that Makah has "geographical, biological and legal interests" that are currently unrepresented in the case. Joint Tr. Br. at 14.

about how the Ninth Circuit will rule on those issues when it reaches them offers no basis for denying certiorari. See Martin v. Wilks, 490 U.S. 755, 769 (1989).

2. Respondents assert that one of the three questions presented in Makah's petition -- whether the applicant's interest must be considered in determining timeliness under Rule 24 -- was not presented below. U.S. Br. at 18-19; Wash. Br. at 2-8. Accordingly, they suggest the Ninth Circuit did not "have a record on which to address that question." U.S. Br. at 19. These claims are in error.

In moving to intervene, Makah argued that it had important, legally protected interests in this case and that it would be prejudiced severely were it denied intervention. Dist. Ct. Br. at 5-8; Dist. Ct. Reply Br. at 3-17. These issues were briefed by all parties and detailed

affidavits were filed. Makah specifically argued that the timeliness requirement should be treated leniently because of the likelihood of serious harm to its interests. Dist. Ct. Br. at 9; Dist. Ct. Reply Br. at 17.

Makah sought de novo review of the district court's rulings on interest and impairment in the Ninth Circuit, and the issues were briefed by all parties. Makah again argued that the timeliness requirement should be relaxed because of the likelihood of serious harm to its interests. Ct. App. Br. at 28. Moreover, the Tribe contended that all Rule 24 requirements (including timeliness) should be applied in light of the practical effect of the case on the applicant. Id. at 27-28. Makah did not waive these arguments by also arguing that it satisfied the Ninth Circuit's three-part test, particularly since the district court

and the Ninth Circuit panel were each bound by that test as the law of the circuit. E.g. Charleston v. United States, 444 F.2d 504, 506 (9th Cir.), cert. denied, 404 U.S. 916 (1971).[2]

The Ninth Circuit failed to address the issue of prejudice to Makah not because of any defect in the record or because Makah failed to raise the issue, but because of its adherence to the circuit's three-part timeliness test. Pet. App. A48-57. Makah's Petition for Rehearing (at 14-15) again asked the court to consider the interests of absent parties in determining timeliness:

> [I]n the context of ongoing natural resources litigation, the practical importance of the right to intervene cannot be overstated. Where such litigation continues indefinitely, due process would seem to require that non-parties with an interest in the case, who are not represented by the existing

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[2] As shown by this Court's grant of certiorari in Lee v. Weisman, No. 90-1014, litigants need not brief issues that are foreclosed in the lower courts.

> parties, have the ability to intervene in future proceedings. Yet this court adopts a rule which permanently freezes all non-parties out of a forum that has the continuing power to make crucial decisions concerning public rights, solely because they did not participate in the past.

Makah argued at every stage that the impairment of its interests is an important factor in the Rule 24 timeliness analysis. There is a complete record on that issue. The question whether the Ninth Circuit erred by making the timeliness issues dispositive, and then completely ignoring Makah's interests in its review of the timeliness question, is squarely presented for review by this Court.

3. The Columbia River tribes contend there is no circuit conflict over the issue whether prejudice to the applicant must be considered in the timeliness analysis. Joint Tr. Br. at 1. The United States, however, implicitly concedes that a conflict exists. U.S. Br. at 17-18.

a. As noted in our petition (at 29-30) and acknowledged by respondents, at least five circuits require district courts to consider formally prejudice to the applicant as part of a four-part timeliness analysis.[3] Failure to do so was reversible error in at least four cases,[4] belying the assertion that prejudice to the applicant is

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[3] These include the First, Second, Fifth, Seventh and Eleventh Circuits. Although the Tenth and D.C. Circuits have not adopted a formal test, they typically balance the interests of the applicant against the interests of the existing parties in evaluating timeliness. See, e.g., Sanguine Ltd. v. United States Dept. of Interior, 736 F.2d 1416, 1419 (10th Cir. 1984); Hodgson v. United Mine Workers, 473 F.2d 118, 129 (D.C. Cir. 1972).

[4] Fiandaca v. Cunningham, 827 F.2d 825, 835 (1st Cir. 1987); Walker v. Jim Dandy Co., 747 F.2d 1360, 1365-66 (11th Cir. 1984); United States v. Kemper Money Mkt. Fund, 704 F.2d 389, 392 (7th Cir. 1983); Hodgson v. United Mine Workers, 473 F.2d 118, 129 (D.C. Cir. 1972). See also Sanguine Ltd. v. United States Dept. of Interior, 736 F.2d 1416, 1419 (10th Cir. 1984) (upholding intervention as timely where applicants will suffer prejudice if not allowed to intervene).

not a mandatory consideration in these circuits. In other cases, including those cited by respondents, these circuits gave the applicants' interests sensitive consideration, if not controlling weight, in determining timeliness.[5]

Makah does not contend that prejudice to the applicant is controlling, but simply that it must be considered in an essential balancing of interests. The three-part test applied by the Ninth Circuit, which gives no consideration to the applicant's interests, plainly conflicts with the four-part test

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[5] E.g. United States v. City of Chicago, 798 F.2d 969, 977 (7th Cir. 1986); United States v. Jefferson County, 720 F.2d 1511, 1516 (11th Cir. 1983); Culbreath v. Dukakis, 630 F.2d 15, 22-23 (1st Cir. 1980).

Respondents make much of the fact that in Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977), the court did not consider prejudice to the applicant. In that case, however, the other three factors supported a finding of timeliness, making it unnecessary for the court to consider the extent to which the applicant's interests would provide further support for such a finding.

adopted and followed in five circuits, and with the more informal balancing of interests typically undertaken in two others.

b. Contrary to the respondent tribes' suggestion, Joint Tr. Br. at 3-5, the Ninth Circuit's three-part analysis is flatly inconsistent with the directive in NAACP v. New York, 413 U.S. 345, 365-66 (1973), to examine "all the circumstances." This Court has always considered prejudice to the applicant to be a relevant circumstance.[6] The three-part test applied by the Ninth Circuit (as well as by the Third, Fourth and Eighth Circuits) precludes consideration of prejudice to the applicant and, rather than promoting "flexibility," stifles it.

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[6] See NAACP, 413 U.S. at 368-69; United Airlines v. McDonald, 432 U.S. 385, 395-96 and n. 16 (1977); Arizona v. California, 460 U.S. 605, 615 (1983).

c. The respondent tribes' suggestion that prejudice to the applicant is not and should not be an important consideration in evaluating timeliness is also inconsistent with Martin v. Wilks, 490 U.S. 755 (1989). The attempt to analogize the intervention applicant to a "defaulting party," Joint Tr. Br. at 9 (quoting Culbreath v. Dukakis, 630 F.2d at 25 (Aldrich, J., concurring)), disregards this Court's holding that a non-party has no duty to intervene when he acquires knowledge of a lawsuit; rather, the burden is on the existing parties to join him when such a step is indicated. 490 U.S. at 765. This allocation of responsibilities suggests that the interests of the applicant (who has violated no duty) should be given at least as much weight in the timeliness analysis as the interests of the existing parties (who did not meet their burden).

4. Respondents argue that, even if Makah's interests had been considered, the circuit court still would have affirmed the district court's timeliness holding because Makah is not "significantly" or "directly" affected by this case. U.S. Br. 15-16, 19, 20-21; Joint Tr. Br. at 18-20; Wash. Br. at 12-14.[7] However, the Ninth Circuit addressed none of the arguments now urged by respondents regarding the effect of this case on Makah. If this Court holds that an applicant's interests must be considered in the timeliness analysis, the case can be remanded to the circuit court to consider these arguments.

In Makah v. Verity, 910 F.2d 555, 557 (9th Cir. 1990), the same panel that decided

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[7] For Makah fishermen whose harvests and incomes are restricted, and for Makah elders who receive less fish for subsistence, in order to accommodate in-river escapement goals or harvest levels, the effects of this case are not "indirect" but very real.

this case found that the relationship between ocean and in-river allocations of finite salmon runs was so clear that in-river tribes (who have no treaty rights to fish in the ocean) would inevitably be prejudiced by the determination in their absence of an action involving ocean allocations. 910 F.2d at 560. If it were to consider the converse but parallel issue here -- namely, whether an ocean tribe is prejudiced by the determination in its absence of an action involving in-river allocations -- the Ninth Circuit would hardly accept the double standard urged by respondents and hold that there is no prejudice to the excluded ocean tribe.

Contrary to respondents' suggestions, there are no other forums in which Makah might protect its interests. Their suggestions are to:

-- participate in administrative

proceedings under the Magnuson Act (U.S. Br. at 20; Joint Tr. Br. at 19-20). Makah's ability to participate in the public portions of the PFMC process does not provide access to the confidential negotiations conducted under the consent decree in this case, which determine in-river management measures and heavily influence the public PFMC process. See Joint Tr. Br. at 13 ("only parties to the Plan can participate in negotiations and processes under the Plan"). Key members of the PFMC are active participants in those private negotiations, and all PFMC members attend private meetings to address this and other litigation. See U.S. Br. at 20.

-- seek judicial review of ocean regulations (U.S. Br. at 21; Joint Tr. Br. at 19). This approach has been unsuccessful. To the extent that allocation or management of Columbia River runs is in

issue, under Verity such a suit must be dismissed because the Columbia River tribes are indispensable parties.[8]

-- raise these issues in United States v. Washington (Joint Tr. Br. at 19 n. 8). When Makah attempted this, the United States argued and the district court agreed that allocation of Columbia River runs was outside the scope of the case and could only be considered in a proceeding in which the Columbia River tribes were parties.

-- intervene in this case in the future (U.S. Br. at 19). The decisions

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[8] Contrary to the United States' argument (Br. at 21-22), the prejudice to Makah is not simply a product of its inability to obtain judicial review of promulgated regulations. Even if judicial review were available, it is far less effective than the ability to participate in the critical processes that shape the regulations in the first place. E.g., Natural Resources Defense Council v. Costle, 561 F.2d 904, 909 (D.C. Cir. 1977). Thus, the real problem here is Makah's exclusion from this case, the forum for in-river management of Columbia River fisheries.

below would preclude this, and the respondent tribes would surely oppose it.

5. The Ninth Circuit's reliance on Makah's alleged delay and the possibility that intervention would upset the smooth operation of the consent decree conflicts with Martin v. Wilks.[9] No one claims this issue was not preserved. However, respondents contend there is no conflict because Makah is not bound by the consent decree (U.S. Br. at 16 n. 11), and has other forums in which to protect its interests (Joint Tr. Br. at 18-20).

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[9] Wilks was a major departure from the approach of virtually every circuit to the rights of third parties who are affected by consent decrees. Before it was decided, a combination of factors had "led to a series of decisions that make C [an affected third party] go away. C is always raising his claims in the wrong place or at the wrong time or in the wrong way." Laycock, "Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties," 1987 U. Chi. Legal F. 103, 153. As Makah's search for a forum makes clear, Wilks has not overcome the desire to make "C" go away.

a. The rule that nonconsenting parties are not bound by consent decrees was established before Wilks. E.g., Firefighters v. Cleveland, 478 U.S. 501, 529 (1986). The real issue in Wilks was whether such nonconsenting parties could be denied access to a forum in which to litigate their claims on the grounds that they had delayed seeking intervention in an existing case, and that they would upset a settlement agreement. This Court refused to deprive third parties of access to a court on these grounds. 490 U.S. at 763-65, 768.

b. Reliance on Makah's alleged delay in seeking intervention here, especially in light of the complex and evolving relationship between this case and ocean fisheries (Pet. at 10-15), is plainly at odds with Wilks. Because the "parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought

in the action," the burden is on them to bring in additional parties when such a step is indicated, rather than on the additional parties to intervene when they acquire knowledge of a lawsuit. 490 U.S. at 765. This is particularly true here since, as the district court noted (Pet. App. at C15), Makah was excluded from the consent decree negotiations.[10]

c. Reliance on possible interference with implementation of the consent decree is even more profoundly in conflict with Wilks. The relief Makah seeks here, intervention in on-going proceedings to implement a consent decree, is a far less

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[10] The district court's assertion that Makah offered no reason for its delay, Pet. App. at C19, is contradicted by the record. For example, Makah showed that the existing parties had made repeated statements that their negotiations would not affect ocean fisheries without first allowing Makah an opportunity to participate. E.g. Dist. Ct. Br. at 2-4, 9-10; Dist. Ct. Reply Br. at 17-18.

intrusive remedy than allowing (as this Court did in Wilks) nonconsenting parties to file an entirely new lawsuit that would override the substantive provisions of a consent decree.[11] In its brief to this Court in Wilks, the United States recognized that the same principles that defeat the collateral attack doctrine preclude a timeliness challenge under Rule 24:

> Rule 19 imposes a duty; Rule 24 creates only an opportunity. The plaintiff and the court should not be allowed to ignore their responsibilities under Rule 19, and then oppose intervention or subsequent litigation on grounds of timeliness.

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[11] The United States recognizes that Makah's participation in future proceedings will not upset the consent decree. U.S. Br. at 12-14; cf. Pet. at 47-48. In the lower courts Makah made clear that there were two distinct components to its proposed intervention -- opposition to the Plan and participation in future proceedings -- and analyzed each separately. E.g., Dist. Ct. Reply Br. at 18; Ct. App. Br. at 28-29. The lower courts' erroneous analysis of the effect of intervention in future proceedings cannot be excused by Makah's separate request to oppose the Plan.

Wilks, U.S. Br. at 20-21 n. 16 (quoting Laycock, supra, 1987 U. Chi. Legal F. at 142) (emphasis added).

In view of the explicit position advanced by the United States, and the strong opinion of this Court, the United States' current assertion that Wilks has "no relevance" here is remarkable. We recognize that the United States -- as an active litigant in a multitude of complex cases -- has strong interests in being able to enter into consent decrees and then shield those decrees from disruption by third parties. However, these concerns were thoroughly addressed in Wilks and are to be met by joinder under Rule 19, not by depriving an unjoined but affected third party of access to court.

d. Finally, even if (despite its experience to date) Makah were to obtain access to a forum to challenge in-river

management actions, it would seem far less prejudicial to respondents to permit Makah to participate in implementation of the consent decree in the first place. That has been the result in Wilks: the litigation has proceeded in the original case, where the white firefighters were allowed to intervene (despite a previous holding of untimeliness). From the perspective of protecting the interests of all parties and promoting the economical use of judicial resources, this would be the most sensible result here as well. In practice, it is the only result that will protect Makah's interests.

Respectfully submitted June 13, 1991.

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